(10)

No. 97-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CASS COUNTY, MINNESOTA, *et al.*,
Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state or local government can assess *ad valorem* taxes on land parcels within an Indian reservation where Congress alienated these parcels from tribal control and placed them into the open market more than one hundred years ago, but the Tribe has recently repurchased the parcels from private parties and holds them in fee.

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INTEREST OF AMICI CURIAE COUNTIES

Amici are counties in five states which provide a wide variety of services to their residents and lands within their boundaries. All these counties include lands which were at one time within the boundaries of Indian reservations and lands that were at one time held in trust by the United States (and therefore not taxed).

Congress later provided that much of this land be conveyed to individual Indians and to others, with most ultimately passing into fee ownership. The core of this policy was the General Allotment Act of 1887, 24 Stat. 388, but other Acts of Congress specific to areas of the Country or to particular tribes and bands further implemented that policy.

One group of these counties (identified above) are within the State of Minnesota, within which the Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 involved herein was one such implementing Act, and so the rewriting of this part of history by the circuit court is particularly problematic to those counties.

Amici are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered throughout the counties, some of which are owned by Indians and Indian tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, counties have routinely taxed fee lands as necessary to provide services to the lands and their occupants. This practice has been the accepted rule for decades. The level and cost of services provided by the counties has increased, as has been true for government services more generally. Landowners as taxpayers have often, and understandably resisted increases in property taxation to provide such services.

In many of *Amici* counties, the services requested or required by lands occupied by Indian tribes have increased to a greatly disproportionate degree. This is for two main reasons. First, many lands are trust lands, and are not

subject to property taxes which are an important primary traditional source of funding for counties. Secondly, more and more tribes are engaged in such activities as casino gambling and tourism-related activities which have higher than proportionate impacts through bringing large numbers of non-residents to temporarily visit or stay in the counties. Policing and road costs are examples of areas in which these impacts are greater than those associated with the more usual activities of residents on their lands.

The problem is cumulative: bringing higher costs to counties, with a taxable land base which already includes trust lands which do not fully share the costs. The decision below will further aggravate these problems (while complicating further the administrative process of determining, assessing and collecting).

As will be noted from the list of *Amici* above, ten of the counties herein represented are within the State of Minnesota, and therefore share some of the history of Petitioner, notably the Nelson Act and that Act's careful implementation with the specific consent of the Indians in Minnesota. The history of the counties located in other states is substantially the same with respect to the taxation of fee lands.

The position of the United States in continuing to challenge the legitimacy of this taxation as trustee for Indian tribes is of special concern. In *Yakima County v. Yakima Indian Nation,* 502 U.S. 251 (1992), the United States expressly told this Court:

> Thus, if the Court agrees with the position of *either* party in this case, its legal ruling would be *dispositive* of this and other *pending* and *future cases,* and therefore would *obviate the need for potentially protracted and complex litigation* regarding the impact of real estate taxes on a case-by-case basis . . . we urge the Court to grant review now . . . and thereby to resolve a question of recurring importance on Indian reservations.

Br. for the United States as *Amicus Curiae* at 8, *Yakima County v. Yakima Indian Nation,* 502 U.S. 251 (1992) (Nos. 90-408, 90-577) (emphasis added).

By Order of January 7, 1991, this Court had invited the Solicitor General to file a brief expressing the views of the United States in *Yakima.* In response, the United States urged this Court to grant review for the broad policy reasons noted in the above quotation.[1]

A substantial number of *amici* counties also participated in the *Yakima* litigation in an attempt to "resolve" this question of "recurring importance." *Id. See* Br. for La Plata County, Colorado, *et al.* as *Amicus Curiae* in Supp. of Pet'rs, *Yakima* (Nos. 90-408, 90-577). After this Court granted the petition, the United States, of course, supported the position of the Indian tribes. On the merits, the views of the United States were squarely rejected.

Contrary to the express representation to this Court, the United States then proceeded, as a party or as *amicus curiae* in other cases across the country, to continue to support additional litigation of this kind. In these cases, the United States maintained that *Yakima* should be *narrowly* construed and *severely* restricted in application. As a result, the concerns that prompted the filing of the *amici curiae* brief by the Counties in the *Yakima* case have only been exacerbated.

The tax records in county court houses are being rifled. Since 1987, tribal governments across the

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[1] Earlier, the United States repeatedly told the Ninth Circuit Court of Appeals the same thing:

> The issue is important.—The issue is of *great importance* to Indians on reservations *throughout* the United States . . . applies to the *vast majority* of Indian reservations in the United States . . . The *broad importance* of the decision to reservation Indians. . . .

Mem. for the United States as *Amicus Curiae* in Supp. of Pet. for Reh'g and Suggestion for Reh'g *En Banc* at 1, 2, *Yakima,* 960 F.2d 793 (No. 88-3926) (emphasis added).

> country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands . . . As a result, members of tribes have refused to pay their taxes . . . tax abatement petitions have been filed . . . individual lawsuits have been filed against counties in State courts . . . tribal lawsuits have been filed against counties in federal courts . . . and even worse, the United States, just a year ago, after the decision below, targeted one *Amici* county and sued the county and the State in federal court in the name of the United States . . . . (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

Id. at 1.

Taxation is a matter of crucial importance to county governments. As noted above, in recent years the need for services in some counties has skyrocketed because of tribal casino development and other related tribal activities. For example, in one rural *Amici* County *total* taxes collected by the county per year have increased by approximately thirty-three percent (33%) due to casino related expenditures.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in one county, approximately 60 percent of the entire county is held in trust by the United States for the

tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 15 percent of the seven hundred and fifty thousand ($750,000) to eight hundred and fifty thousand ($850,000) dollars of total taxes collected by the county per year in recent years. In another county, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But the exact percentage is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional Policy. That Congressional Policy has authorized the taxes here—and not simply on a restricted case by case basis, as the court of appeals has indicated. The issue in this case represents a fundamental and most basic concept in federal Indian law that has been resolved and relied on for decades.

The decisions of this Court in *Goudy v. Meath*, 203 U.S. 146 (1906), and *Yakima*, 502 U.S. 251, were not intended to be limited in this manner. The Counties submit this *Amici* brief to make clear that tradition, precedent and the decisions of this Court support the concept that Congress generally equated alienability with taxation. In addition, nothing in the application of these principles in Minnesota supports any other conclusion. The Minnesota documentation affirmatively establishes that Congress clearly intended all Nelson Act lands would be similarly taxable.

SUMMARY OF ARGUMENT

The decision of the panel majority of the Eighth Circuit Court of Appeals has incorrectly restricted the "alienability equals taxability" principles central to the decisions of this Court in *Goudy v. Meath* and *County of Yakima v. Yakima Indian Tribe*. A brief review of nearly a century of federal Indian law precedent from this Court makes that historical understanding clear. In addition, Congress did not intend anything in the Nelson Act or related legis-

lation to alter that traditional principle. As a result, although the Minnesota legislation was tailored to the status of those reservations, the thrust of the documentation clearly confirms congressional understanding of taxability.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS IS CONTRARY TO A TRADITION OF TAXATION AND CONFLICTS IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT.

At the petition stage in this litigation, the Counties fully supported the reasons for granting the petition set forth in the petition and in the brief of supporting *amici curiae* States. Br. for Lewis County, Idaho, *et al. Amici Curiae,* in Supp. of Pet'rs, Cass County, Minnesota, *et al., Cass County, Minnesota v. Leech Lake Band of Chippewa Indians* (No. 97-174) (August 29, 1997). The Counties recognized that the primary considerations governing review would focus on the conflict among the circuits and the conflict with the decision of this Court in *Yakima*. The Counties further submitted that the decision of the panel conflicted substantially with other related decisions of this Court and a tradition of taxation. The brief in support at that time focused on that tradition and highlighted those decisions.

On the merits, this Counties Brief will first generally address those same important areas. In addition, however, we now also highlight the aspects of the Nelson Act, that confirm that the same congressional understanding was applied to Minnesota. In this regard, we have appended the significant excerpts from H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1889) that unequivocally supports that position. *Amici* Co. App. at 1a-141a.

A. Introduction.

In order to place the taxation of fee lands issue in historical context, one need first refer to the fact that until 1989, nearly everyone, including the United States, acted upon the recognition that such taxes were clearly permissible. At the petition stage, the Counties appended the opinion of the Associate Solicitor, Division of Indian Affairs, of the Department of the Interior Memorandum to this effect dated March 22, 1979. *Amici* Co. Pet. App. 1a-3a.

In fact, this is the reason that Respondents cannot cite any other appellate opinions that have reached the tax exempt conclusion. There are none. These decisions (*Leech Lake* and *Michigan*) represent the first time any courts of appeals have ever held that ordinary fee lands owned by Indian tribes or their members are not taxable—not an insignificant point.

Again, the United States is, in large part, responsible for this radical departure from tradition and precedent. For this reason, a few preliminary observations regarding the arguments of the United States submitted below are in order. (Additionally, we fully expect they will be repeated here.)

First, although the United States flaunts its "expertise in Indian law matters" Br. for the United States at 1, *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.,* 108 F.3d 820 (8th Cir. 1997) (No. 95-4263), the United States never acknowledges that:

1. Most of the arguments relied upon by the United States have been just slightly revised from those submitted by the United States in *Yakima* and rejected by this Court.

2. No court of appeals had ever adopted the argument of the United States.

3. A century of agency opinions and congressional action detract from the argument of the United States.

4. A 1902 Congressional Resolution and a 1923 Act of Congress were passed to extend the scope of the General Allotment Act (*See generally Stevens v. C. I. R.,* 452 F.2d 741 (9th Cir. 1971):

> Insofar as not otherwise specifically provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the

provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Joint Resolution of June 19, 1902, 32 Stat. 744:

> That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, be, and they are hereby, extended to all lands *heretofore* purchased or which may *hereafter* be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians.

Act of February 14, 1923, 42 Stat. 1246, 25 U.S.C. § 335 (emphasis added).

5. Provisions in the Indian Reorganization Act of 1934, 48 Stat. 984, and related regulations at 25 C.F.R. 151 detract from the arguments of the United States.

6. The original edition of Felix Cohen's Handbook of Federal Indian Law (1942 ed.) at 258-261, undermines the Non-Intercourse Act argument that the United States again submits.

7. The 1982 Handbook of Federal Indian Law supports the United States, but those arguments were submitted by the United States and rejected in *Yakima*.[2]

In other instances, the argument of the United States was seriously misleading. For example, the following

[2] The original Cohen text (and the subsequent revisions) have been viewed by some as tribal advocacy works. *See* Conference of Western Attorneys General, American Indian Law Deskbook at xiii-xv (1993).

"omission" assertion appears at page 29 in the brief the United States submitted in *Leech Lake*:

> *Yakima* did not, however, address the immunity enjoyed by tribally-owned land. This *omission* likely stems from the Court's primary focus on individual Indian ownership of fee lands in that case.

Br. for the United States at 19, *Leech Lake* (No. 95-4263) (emphasis added).

The United States should know better. The "Question Presented" in the Brief for the United States in *Yakima* was carefully drafted in this respect:

> Whether Yakima County may impose its ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the *Yakima Nation or individual members* of the Yakima Nation.

Br. for the United States as *Amicus Curiae* at I, *Yakima*, 502 U.S. 251 (Nos. 90-408, 90-577) (emphasis added).

Further, tribal ownership was discussed throughout the briefs and noted on four separate occasions in the text of the *Yakima* opinion. *Yakima*, 502 U.S. at 256, 264 & n.4. *See also* Tr. of Oral Argument at 4, 18 and 28, *Yakima* (Nos. 90-408, 90-577).

Finally, at other times, the United States inadvertently undermined the position of the Leech Lake Band. For example, in this instance, the Leech Lake Band would like this Court to think that the Nelson Act was unusual and atypical in every respect. Br. in Opp'n, *Leech Lake* (No. 95-4263). On the other hand, the United States routinely recognized that:

> The Nelson Act, ch. 24, 25 Stat. 642, was one of a series of allotment acts passed by Congress after the passage of the General Allotment Act of 1887, 24 Stat. 388.

Br. for the United States at 2, *Leech Lake* (No. 95-4263). In this case, the United States is undoubtedly correct. For example, *see* the Great Sioux Act of 1889, 25 Stat.

896, where the General Allotment Act was, like the Nelson Act, simply tailored to the specific situation existing in the State at issue. Until recently, no one claimed that the South Dakota fee lands were not taxable.

In short, the United States recognized early on in the *Yakima* litigation that the General Allotment Act was a statute of general applicability, amended on several occasions to further reflect its universal application, and in some instances, as in Minnesota, specifically incorporated by express reference in the text of related legislation dealing with allotments required by previous legislative formats. Accordingly, *Yakima* was thoroughly briefed on both sides in recognition of this fundamental understanding, with the United States (and 25 different tribes from across the country) submitting dozens of arguments in their briefs to preclude the taxation of fee lands. As *Yakima* attests, this Court, with one dissent, rejected these ad valorem tax exemption claims.

Because it is not possible for any Opinion to address each and every argument that is not deemed persuasive, the assumption that this Court in *Yakima* did not address or consider all arguments of substance would be especially unwarranted in this instance. The United States and others filed *exhaustive* briefs detailing every conceivable argument in support of a tribal tax exemption on fee lands (including the *Goudy*, 203 U.S. 146, has been overruled argument, the *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) argument, the 1934 Indian Reorganization Act argument, the 18 U.S.C. § 1151 Indian Country argument, *and* the 25 U.S.C. § 177 argument)[3]—all of which were rejected. In *Ya-*

[3] Immunity of Indian lands from state taxation and control is at the very core of federal Indian policy. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); 25 U.S.C. § 177.

Br. for the United States as *Amicus Curiae* at 12, *Yakima*. *But see Larkin v. Paugh*, 276 U.S. 431, 433-434 (1928) and *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986).

kima, as in other recent cases, the position of the United States was simply tailored to support the arguments of Indian tribes. And this is the perspective from which the opinions of the courts of appeals that have adopted those arguments in these cases should be viewed.

B. The General Allotment Act And All Other Legislation Have Been Consistently Construed To Generally Authorize The Taxation Of Fee Patent Land.

As we noted in *Yakima*, although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1891), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 188 U.S. 432 (1903).[4] There, the United States correctly headed its argument with the proposition that "the lands of the Indian allottees are not taxable under the authority of the State *during* the trust period" and concluded that improvements were similarly "exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land." Br. for the United States at 15, 42, Rickert (No. 216) (emphasis added). The *Rickert* opinion reflects this representation:

> [N]o power in the State of South Dakota, for State or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians . . . . *While* the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

Rickert, 188 U.S. at 437, 442 (emphasis added).

[4] Early in the previous decade, prior to the adoption of the General Allotment Act, this Court rejected a related claim for exemption in *Pennock v. Board of County Comm'rs of Franklin County*, 103 U.S. 44 (1881):

> When the patent of the government is once issued for the lands, all restrictions upon their alienation, not expressly named, are gone.

Id. at 48.

A few years later, in *Goudy*, 203 U.S. 146, a related issue was generally discussed and decisively resolved. The *Goudy* alienation argument, addressed in detail by others, need not be repeated here.

In *United States v. Nice*, 241 U.S. 591 (1916), a case involving a federal prosecution for the sale of liquor to a tribal member with a 1902 trust patent, the United States only indirectly touched on this aspect of the General Allotment Act and the status of the individual:

> [C]ongress by this very act of 1887 expressly retained control over the allottee Indian's land *by restrictions of alienation and trusteeship* . . . The State, having *no power to tax* these Indian [trust] allotments, had no particular interest in the Indian's welfare . . . . [I]t was well established that State laws relating to *taxation* of his [trust] property did not apply . . . .

Br. of the United States at 26, 21, 12, *Nice* (No. 681) (emphasis added).

The Court in *Nice* referred to this aspect of the General Allotment Act when it described the holding in *Rickert*:

> The act of 1887 came under consideration in *United States v. Rickert*, 188 U.S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the horses, cattle and other personal property issued to them by the United States and used on their [trust] allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition," held that the State was *without power to tax* the [trust] *lands* and other property, because the same were being held and used in carrying out a policy of the Government . . . .

Nice, 241 U.S. at 600-601 (emphasis added).

Two years later, the United States was more succinct when it argued another tax exemption issue in *United States v. McCurdy*, 246 U.S. 263 (1918):

> Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land *for a limited period*, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy . . . . In *United States v. Rickert*, 188 U.S. 432, it was decided that *trust* allotments and personal property issued to Indian allottees could not be taxed by a State because this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race . . . ."

Br. for the United States at 9, 11, 12, *McCurdy* (No. 685) (emphasis added).

In *McCurdy*, the United States argued that land purchased with trust funds for an Osage Indian, as evidenced by a restrictive deed, should not be taxable by the State of Oklahoma. The *McCurdy* Opinion rejected the tax exemption argument of the United States in no uncertain terms. At the same time, the Court clearly restated the basis of *Rickert*:

> There is also a *clear distinction* between the present case and those like *United States v. Rickert*, 188 U.S. 432, 23 Sup.Ct. 478, 47 L.Ed. 532, where it was sought to tax property, *the legal title of which was in the United States* and which was held by it for the benefit of Indians.

McCurdy, 246 U.S. at 272 (emphasis added). Nothing in *United States v. Nice, supra*, was argued or cited by the United States and *Nice* did not figure in the Opinion of the Court in *McCurdy*, and correctly so.

A case more directly on point reached this Court in 1939. In *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939), the United States

equated a General Allotment Act trust patent with the exemption from taxation:

> The *trust patents* issued in fulfillment of that treaty and pursuant to the General Allotment Act of 1887 [24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182] bound by the United States to convey the land "free of all charge or incumbrance whatever" at the end of the *trust period*. *Such* [trust] *patents* have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation effecting the land.

Br. for the United States at 6-7, *Board of Comm'rs of Jackson County, Kansas v. United States* (No. 1728) (emphasis added).

Although *Board of Comm'rs of Jackson County, Kansas* only involved the question of whether interest should be awarded when taxes were erroneously assessed, the opinion mentions the General Allotment Act and reflects the understanding of that time:

> The land which gave rise to this controversy, situated in Jackson County, Kansas, was [trust] patented under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion . . . .
>
> In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding *trust patent* and in its place issued a *fee simple patent*. This was duly recorded in the Registry of Deeds for Jackson County. *In consequence* Jackson County in 1919 began to subject the land to its *regular property taxes*. It continued to do so as long as this *fee simple* patent was left undisturbed by the United States. . . . Jackson County in all innocence acted *in reliance on a fee patent* given under the hand of the President of the United States. . . . Here is a long, unexcused delay

> in the assertion of a right for which Jackson County should not be penalized. By virtue of the *most authoritative semblance of legitimacy under national law*, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had *every practical justification* for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she *could not* have known was not *properly* hers.

Board of Comm'rs, 308 U.S. at 348-349, 352-353 (emphasis added).

In 1943, in a most instructive Minnesota case that involved a special modification of the twenty-five year trust limitation of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United States conceded that subsequent to that period, the land was legally taxable. Br. for the United States at 17, 43, *Mahnomen County v. United States*, 319 U.S. 474 (1943) (No. 684) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

> It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

Mahnomen, 319 U.S. at 475 (emphasis added).

Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen*, No. 684. Although *Mahnomen* is a Minnesota case decided by this Court, and although it specifically deals with the Nelson Act and the taxation of real property owned by tribal members, *the United States*

neglected to cite or discuss it in the court of appeals. Similarly, the court of appeals mentioned *Mahnomen* only in passing, as a case that simply suggested that the land might only be free from taxation during the original trust period," and then cited the dissent for that proposition. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota,* 108 F.3d 820, 823 (8th Cir. 1997), Pet. App. 6. In this respect, the decision of the panel majority is in further conflict with a decision of this Court, as a thorough reading of *Mahnomen* attests.[5]

In 1952, the United States in *Bailess v. Paukune,* 344 U.S. 171 (1952), generally described two instances where it deemed taxation to be "forbidden by the General Allotment Act":

> [W]hether *under trust patents* or *under fee patents with restrictions* upon alienation . . . .

Br. for the United States at 2, *Bailess v. Paukune* (No. 242) (emhpasis added).

Bailess involved the taxation of land of an alleged Indian widow, who in due course was to receive a "fee patent" for the interest she inherited from her husband in a trust allotment. The Court concluded her interest was taxable if she was a non-Indian and in the process noted:

> This allotment was made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 389. . . . No fee patent to the land has issued to *Paukune,* to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for *Paukune* and his heirs. . . .

Bailess, 344 U.S. at 171-172 (emphasis added).

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of

[5] *See also Nichols v. Rysavy,* 809 F.2d 1317 (8th Cir. 1987), *cert. denied,* 484 U.S. 848 (1987), and *County of Thurston v. Andrus,* 586 F.2d 1212 (8th Cir. 1978), *cert. denied,* 441 U.S. 952 (1979).

1906, 34 Stat. 182, the United States succinctly stated that:

> [T]his provision was undoubtedly intended *to make it clear* that Indian lands transferred *in fee* to the Indians would *thereafter* be subject to state and local taxation . . . .

Br. for the Pet'r at 13 n. 4, *Squire v. Capoeman,* 351 U.S. 1 (1956) (No. 134) (emphasis added).

The opinion of the Court accepted the basic premise of the argument:

> The Government argues that this amendment was directed solely at permitting state and local taxation *after a transfer in fee,* but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to *all taxes only after a patent in fee* is issued to the allottee.

Squire, 351 U.S. at 7-8 (emphasis added).

In *United States v. Mason,* 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

> [R]elied on language in an amendment to the General Allotment Act providing for *taxation of the land after the allottee receives a patent in fee* . . . [and] held that an amendment to the General Allotment Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . *and provided for taxation after the termination of the trust.*

Br. for the United States at 9-10, 17, *Mason* (Nos. 72-654, 72-606) (emphasis added).

The Court in *Mason* agreed:

> Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of 'all restrictions as to sale, encum-

> brance, or taxation' *when Indian property is granted in fee. . . .*

Mason, 412 U.S. at 396 (emphasis added).

Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

> The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that —for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and *taxation are lifted*. This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument at 38, *Mason* (Nos. 72-654 72-606) (emphasis added).

Most recently, in *United States v. Mitchell*, 445 U.S. 535 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

> The General Allotment Act . . . for the limited purpose of (a) restraining improvident alienation of the land by the allottees and (b) affording an immunity from state taxation for the period *during* which the legal title remained in the United States. . . .

Br. for the United States at 24, *Mitchell* (No. 81-1748) (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

> That statute contemplated a scheme whereby the land of the reservation would be divided among the Indians within 25 years, and in the *meantime*, the

> United States was simply to hold title in trust solely for the *purpose* of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument at 14, *Mitchell* (No. 81-1748) (emphasis added).

This Court agreed:

> [W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell, 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land *is made inalienable and non-taxable* for a sufficient length of time.' . . ." *Mitchell*, 445 U.S. at 544, n. 5. In dissenting, Justice White described the holding of the Court in the same terms:

> The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring *immunity from state taxation during the period* of the restraint.

Mitchell, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

C. All Related Opinions Reflect That The General Allotment Act And All Other Legislation Were Clearly Understood To Generally Authorize The Taxation Of Fee Patent Land.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion

from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

> I am also of the opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians*, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty. Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior reinforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the original Nez Perce Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

> [T]he subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.
>
> The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that Act contains no provision exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period, I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

53 L.D. 133, 136 (1930), *Amici* Co. Pet. App. 6a.

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970s, an Associate Solicitor of the Department of the Interior reasoned that:

> [L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA, IA. No. 0943, April 21, 1989. The decision of this Court in *Yakima* authoritatively resolved that question.

In this case, the Court should make clear that the principles recognized in *Goudy* and *Yakima* were not intended to be narrowly construed and severely restricted in application.

II. THROUGH THE NELSON ACT, CONGRESS LEFT LANDS IN MINNESOTA FREELY ALIENABLE AND TAXABLE (ONLY EXCEPTING THOSE HELD IN TRUST).

As we have noted above, ten *Amici* Counties have particular interest in the faulty analysis of the circuit court. That court's disregard of Congress' special expression of intent for lands in the State of Minnesota has particular impact in those Counties, which have lands similarly affected (and which provide services to those lands and their residents at substantial costs). Indeed, as gambling and tourism oriented facilities proliferated, costs have dramatically increased from temporary visitors.

Historically, the Nelson Act was legislation focused on the reservations within Minnesota. Act of January 14, 1889, ch. 24, 25 Stat. 642. As introduction to this section, we quote the direction of Congress in that Act "for the relief and civilization of the Chippewa Indians in the State of Minnesota." By the Act, a commission was established and sent to Minnesota:

> [T]o negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the *complete cession and relinquishment* in writing of *all their title and interest* in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, ...

Id. (emphasis added).

The provisions of the Act were specifically implemented through the process of negotiation with the Indians. The Nelson Act also went on to summarize what would be the end result:

> [T]he acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a *complete extinguishment of the Indian title* . . .

Id. (emphasis added).

H. R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1889) which is excerpted in *Amici* Co. App. at 1a-141a, sets forth the history of this process as fully implemented.

For the convenience of the Court, the first part of the Amici County Appendix reproduces in its entirety the textual section of H. R. Exec. Doc. No. 247 at 1-27, *Amici* Co. App. at 1a-54a. The balance of H. R. Exec. Doc. No. 247 consists of the transcripts of all of the negotiations. H. R. Exec. Doc. No. 247 at 66-193. The *Amici* Counties have reproduced the complete Leech Lake portion of the negotiations because that is the area directly involved in this case. H. R. Exec. Doc. No. 247 at 117-148, *Amici* Co. App. at 54a-141a. We also discuss, but do not reproduce, related aspects of the Mille Lac negotiations. The balance of the negotiations generally reflect the same or similar principles and understandings, but they are not reproduced in the Appendix.

Early on, the Eighth Circuit Court of Appeals concisely summarized the history of the Nelson Act set forth

in H. R. Exec. Doc. No. 247 and subsequent related legislation in a tax related case that was not mentioned by the court below. *Morrow, County Auditor v. United States,* 243 F. 854 (8th Cir. 1917). In 1917, the entire concept was recent history and the manner in which the court set forth the issue at that time is significant:

> To execute that part of the plan, the method laid down in the recently enacted General Allotment Act was deemed suitable. Therefore it was, by reference instead of repetition, incorporated into the Nelson Act as a part of that agreement. The General Act, § 5, set this forth in detail. It provided that the title should be held by the President in trust for 25 years free from "all charge or incumbrance," which meant, in effect, freedom from taxation.
>
> If the Nelson Act had set out in detail the terms upon which the allotments were to be made, it could not be successfully contended that those terms were not a part of the agreement, or that any title or rights resulting therefrom when once vested would not be free from alteration. Can this be less true because the allotment method is incorporated by reference? This incorporation of the method outlined in the General Allotment Act by reference made that method part of the agreement with precisely the same effect as though its terms had first found expression by being set out in full as a section of the Nelson Act. The General Allotment Act was not made applicable to these allotments in any other sense. They were not under the authority of the General Allotment Act at all, but "in conformity with" it under the authority of the Nelson Act.
>
> If there were any doubt as to the status of this matter, the understanding of the Indians as to the agreement would control. Kansas Indians, 5 Wall 737, 18 L.Ed. 667; Jones v. Meehan, 175 U.S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. *Several hundred copies of both the Nelson and of the General Allotment Acts were distributed among the Indians and were*

> *discussed by them and the commissioners* as constituting parts of one agreement. As to these very matters of title and taxation, the Indians were very inquisitive and solicitous. The commissioners gave them the direct assurance that their alloted lands would not be taxed for 25 years "*because* the President holds this land in trust for you," and it was so understood by them.
>
> A *trust* patent in exact compliance with such understanding and agreement was issued this Indian, and under it he has taken and holds this land. His rights are vested and are impervious to alteration against his will except through the sovereign power of eminent domain. One of these rights was freedom from state and location taxation.

Id. at 858 (emphasis added).

There is no indication that *Morrow* received any consideration in the decision of the panel majority.

In *Leech Lake*, the circuit decision committed two tiers of analytical error leading to its decision that frustrates the intent of Congress with respect to Minnesota. The decision also severely impacts funding for services many *Amici* Counties provide to these same lands.

The first error of the circuit court which has been discussed, *supra* at 11-21, was ignoring that it was the policy of Congress to make fee lands, once freely alienable, taxable as well. Note: This has the practical effect of allowing (funding) and encouraging state and county services.[6]

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[6] As the County noted in *Yakima*:

> [T]he outcome of this case will also affect a multitude of other states, counties, school districts, fire districts, and countless other entities and the revenue they may derive to defray the cost of Indian reservation services enjoyed by Indians and non-Indians alike. The fiscal importance of the taxing authority involved here, and the proper balance of its consequences as between Indian and non-Indian governments, is plainly a policy matter which should be resolved by the elected representatives of the People, with due regard to all those affected. The legislative process is designed for such purposes. The judicial process is not.

Reply Br. of Pet'rs/Cross Resp'ts County of Yakima at 18, *Yakima Indian Nation* (Nos. 90-408 and 90-577).

On another level, the court failed to recognize that the Nelson Act is a perfect illustration of the implementation of such policy and clear intent of Congress. If appropriate consideration is given to both the terms of that specific act, the actual understanding of both sides, which were communicated through protracted negotiations, and the understood effect, the inescapable conclusion is that the decision below is wrong.

The intent of Congress is summarized in the above-quoted sections of the Act. This is further confirmed by the legislative history. For example:

> It appears by the report of the Commission that it sought and obtained the assistance of Bishop Whipple and Archbishop Ireland in its labors, and that all that was done was conducted in a spirit of fairness towards the Chippewas. There were distributed among them 500 copies of the act of January 14, 1889, and several hundred copies of the general allotment act of February 8, 1887.
>
> Councils were held at Red Lake, White Earth, Gull Lake, Leech Lake, Cass Lake, Lake Winnibagoshish, White Oak Point, Mille Lac, Grand Portage, Bois Forte and Vermillion Lake, and Fond du Lac.

H.R. Exec. Doc. 247, *Amici* Co. App. at 5a.

> The commission reports that although the Indians have decided to take allotments on their reservations, it is believed that many may be induced to remove to White Earth, and for this reason it is not prudent to urge individual allotments elsewhere than on the White Earth and Red Lake Reservations at present.
>
> The removal of those who will go to White Earth will take place as soon as provisions can be made

for their subsistence. It will be of the greatest benefit to the Indians and to the State to have the removal made.

Id. at 12a.

The commissioners state that it is important that the four townships of pine land on the White Earth Reservation should be early estimated and sold, as the timber is liable to be stolen or burned.

Id. at 12a.

I fully concur in the suggestion of the commissioners, that the ceded lands of the White Earth Reservation already surveyed should be disposed of under the terms of the act, at as early a date as possible, but I do not see how the swamp lands referred to and reported to be valuable chiefly for cedar and tamarac can be withheld from sale as requested without further legislation in view of the last clause of section 4 of the act, which reads as follows:

All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this act termed "agricultural lands."

And section 6 provides specifically the manner in which unallotted and unreserved agricultural lands shall be disposed of.

Id. at 12a-13a.

Before the ceded lands within any of the reservations can be disposed of as contemplated in the act, all of said ceded lands must be surveyed as the public lands are surveyed, after which they are to be carefully examined in 40-acre lots, by competent and experienced examiners to be appointed for that purpose, and classified into "pine lands" and "agricultural lands," the pine lands are then to be valued and listed, etc. (section 4), and finally proclaimed as in market and offered for sale in the manner prescribed in section 5.

The agricultural lands not allotted nor reserved for the use of the Indians, after having been surveyed,

are to be advertised for thirty days and disposed of to actual settlers under the provisions of the homestead laws, each settler being required to pay $1.25 per acre for the lands so taken by him.

Id. at 18a-19a.

That nothing should be omitted that could enlighten the Indians as to the intent of the Government, we had printed 500 copies of the act of January 14, 1889, and several hundred of the "Act to provide for the allotment of lands in severalty to Indians," etc., approved February 8, 1887. These we caused to be distributed among the missionaries, teachers, and other employees of the Government, as well as traders, mixed bloods, and Indians who read the English language.

Id. at 26a.

They all earnestly plead for saw-mills, cattle, agricultural and mechanical implements, which they must have or they can make no substantial progress. They must be assisted in breaking and fencing land, building houses, and with provisions, until they can sustain themselves. They are no longer tribal Indians, but citizens at present helpless, and must be treated as such.

Id. at 48a.

The intent of Congress was not only understood but agreed to by the Indians. Records were kept of the negotiating sessions, which were made part of the Report to accompany the Nelson Act, largely contradicting the circuit court's claim that "The details of the negotiations with the Leech Lake Band are unclear, ..." *Leech Lake*, 108 F.3d at 822. See *Amici* Co. App. at 54a-141a.

We shall also use the Mille Lacs as a further example, but the minutes of each are included in H. R. Exec Doc. No. 247. Councils with the Bands ranged up to eleven days (Leech Lake). The majority, however, took four days, as did the Mille Lacs. The commission's negotiations followed a similar format with each Band.

First, the Act was read and carefully explained in its entirety:

> Commissioner Whiting then read the act of Congress under which the commission proceeded, it being interpreted phrase by phrase to the Indians, after which he continued:
>
> This paper is tiresome to you to listen to all at once. You are not expected to understand all of its provisions by the reading of it, but you will find that the commission will listen to your questions, and answer all of them to your satisfaction, explaining everything in the bill that you may not understand.

Tr. of First Council with Mille Lac Indians, Mille Lac Reservation (October 2, 1889), H. R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 164 (1889).

Second, the proceedings went on for many days. Frequently, questions arose as to whether the Indians would be subject to state laws. One particularly notable example, for reasons discussed below, was hunting and fishing:

> In regard to hunting deer, that is a matter for the Legislature of the State to determine. . . . wherever the white man may hunt, your young men will have the same right to do so.

Tr. of Third Council with Mille Lac Indians (October 4, 1889), H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 169 (1889).

Note, this is of particular interest since the hunting and fishing privileges were considered an important part of a claim of Indian title, often the most important. Still, these important rights were extinguished by the cession of the Nelson Act. The panel majority disregarded not only precedent of the Eighth Circuit which so held but decisions of this Court to the same effect confirming the total extinguishment, *e.g.*, *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (*per curiam*); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982).

This Court, in a different context, referred to the importance of hunting and fishing to Indians, access to which was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). *See also, Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (dissent referring to them as "valuable property rights," *citing* 473 U.S. 775 n.1).

The effect of the same Nelson Act cessions in extinguishing such hunting and fishing rights—even where included in treaties had been stated by other panels of the circuit court (cited above), and, most importantly, this Court agreed with that conclusion.[7] It is noteworthy that those cases were not even discussed, much less distinguished, by the circuit court in the decision reviewed here.

It is easiest to summarize the most important part of such cases by using the language of this Court:

> In *Red Lake Band*, a band of Chippewa Indians had ceded "all right, title, and interest in and to" two parcels of land in agreements ratified by Congress in 1889 and 1904. 614 F.2d, at 1162. The Court of Appeals for the Eighth Circuit ruled that the Band had thereby given up its tribal "rights to hunt, fish, trap and gather wild rice free of the state's regulation of such activities," despite the Band's claim that diminishment of the reservation boundaries in the 1889 and 1904 Acts did not abrogate such rights absent explicit reference. *Ibid.*

Klamath, 473 U.S. 753, 764 n.14.

As the body of this Court's decision notes, the decision of the Eighth Circuit (that all rights had been extinguished through the Nelson Act process) was in conflict

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[7] The author of the circuit decision, when a district judge, also declined to apply this reasoning, *see, Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 at 833 (D. Minn. 1994), as had one other district judge before *Klamath*.

with the contrary decision of the Ninth Circuit which this Court reversed in *Klamath*, 473 U.S. 753.

At the conclusion of the extensive Mille Lacs Nelson Act negotiation and several days' explanation by the commission, the Indians individually signed an express extinguishment reading in part:

> [A]nd we do also hereby *grant, cede, and relinquish* to the United States for the purposes and upon the terms stated in said act, *all our right, title, and interest* in and to the lands reserved by us [45] and described in the first article (ending with the words "to the place of beginning") of the treaty with the Chippewas of the Mississippi, proclaimed April 18, 1867 (16 Stat., p. 7-9), and also, to the aforesaid executive addition thereto made and described in an executive order dated October 19, 1873; . . . we do also hereby *forever relinquish to the United States the right of occupancy on the Mille Lac Reservation,* reserved to us by the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693).

Signature Rolls, Mississippi Chippewa Indians, Mille Lacs Bands, H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 45-46 (1889) (emphasis added).

As quoted above at 22, once accepted by the President, this worked a "complete extinguishment." Congress' intended result was to make all fee lands fully part of these states and counties with no tax or other exemption. The Indians understood and agreed. Given that the counties have performed their obligations consistent with this understanding, it is both fair and proper that taxes be paid on fee lands to which these services are provided.

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Cass County and the Brief of *Amici* States, the decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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